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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: November 1, 2019

SUBJECT: Rules of the Director of the Division of Oil and Public Safety, Department of Labor and Employment, concerning explosives regulations, 7 CCR 1101-9 (LLS Docket No. 190184; SOS Tracking No. 2019-00009).¹

Summary of Problem Identified and Recommendation

Section 24-4-104 (4)(a) and (6), C.R.S., does not allow a summary revocation of a permit, and requires a hearing to be held for all revocations and suspensions. But, taken together, Rules 3-4 (A) and 3-4 (D) of the Director of the Division of Oil and Public Safety (Director) allow summary revocation of an explosives permit and require a permittee to request a hearing in order to obtain a hearing for both a suspension and a revocation. **Because the rules conflict with the statute, we recommend that Rules 3-4 (A) and 3-4 (D) of the rules of the Director concerning explosives regulations not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2020, unless the General Assembly acts by bill to postpone such expiration.

Analysis

Rules 3-4 (A) and 3-4 (D), which authorize the summary revocation of a permit and require the permittee to request a hearing to obtain a hearing on a permit suspension or revocation, conflict with the statute.

The statute, section 24-4-102 (7), C.R.S., defines a license to include "any agency permit." Another section of statute, section 24-4-104, C.R.S., allows a summary suspension—that is, a temporary suspension before holding a hearing—of a license where the agency finds that there has been a deliberate and willful violation or that emergency action is necessary. But it does not allow a summary revocation—which is a permanent action—of a license:

24-4-104. Licenses - issuance, suspension or revocation, renewal. (4) (a)

Where the agency has objective and reasonable grounds to believe and finds, upon a full investigation, that **the licensee has been guilty of deliberate and willful violation or that the public health, safety, or welfare imperatively requires emergency action** and incorporates the findings in its order, **it may summarily suspend the license pending proceedings** for suspension or revocation which shall be promptly instituted and determined. For purposes of this subsection (4), "full investigation" means a reasonable ascertainment of the underlying facts on which the agency action is based.

(6) Except as provided in subsection (4) of this section, an agency shall not revoke, suspend, annul, limit, or modify a previously issued license until after holding a hearing as provided in section 24-4-105. **(Emphases added)**

Section 24-4-105, C.R.S., specifies that parties to agency adjudicatory proceedings are entitled to a hearing and that an agency must set and provide notice of a hearing to the parties. If a party does not respond to the notice within 30 days after service, the agency may enter a default against the party. So an agency must set and provide notice of a hearing **before** revoking a permit, and it must eventually set and provide notice of a hearing even for a suspension, in both instances regardless of whether the permittee requests a hearing.

But Rules 3-4 (A) and 3-4 (D),² taken together, allow summary revocation of a permit and require that a hearing be held on a suspension or revocation only if the permittee timely requests one. These rules state:

Section 3-4 Procedure on Revocation, Suspension, or Denial of Explosives Permit

(A) **In any case where the Division denies a permit or the permittee is subject to suspension or revocation** for a violation of Section 3-3 of these regulations, **the Division shall notify the applicant or permittee in writing by first-class mail of the grounds for denial** for the violation. **The notice shall state that the applicant or permittee may request a hearing** in accordance with Sections 24-4-104 and 24-4-105 C.R.S.

(D) **The Division may summarily suspend a permit** if the Division has objective and reasonable grounds to believe that the public health, safety, or welfare requires emergency action. **In such case, the Division shall notify the permittee in writing by first-class mail of the grounds for summary suspension and shall state that the permittee may request a hearing** in accordance with 24-4-105, C.R.S. (Emphases added)

There is a statute that specifically authorizes explosives permit revocations:

9-7-110. Revocation or suspension of permit. A violation of this article or the rules and regulations promulgated pursuant thereto, shall constitute grounds for the revocation or suspension of a permit issued under this article.

The Director also has general rule-making authority regarding the explosives article:

9-7-105. Duties of director of division. (1) The director of the division shall promulgate rules and regulations to implement the provisions of this article. Such rules and regulations may include requirements not mentioned specifically in this article but which are reasonably necessary for the safety of workers, the public, and the protection of property. The procedure for the promulgation of such rules and regulations shall be in accordance with the provisions of section 24-4-103, C.R.S.

² Note that the General Assembly allowed Rules 3-4 (A), 3-4 (B), and 3-4 (D) to expire on May 15, 2019, pursuant to S.B. 19-168, for reasons analogous to those argued in this memorandum. In response, the Director adopted the current rules. A redline version of these rule amendments is attached as **Addendum A**. Note that Rule 3-4 (B) was repromulgated without change, and pursuant to §24-4-103 (8)(d), C.R.S., that rule is void and the Secretary of State has removed it from the Colorado Code of Regulations.

Neither of these statutes negate the requirements in section 24-4-104 (4)(a) and (6), C.R.S., to always set and provide notice of a hearing on any revocation or suspension and to set and provide notice of a hearing before a revocation may be enforced.

Because Rules 3-4 (A) and 3-4 (D) authorize the summary revocation of a permit and require the permittee to request a hearing to obtain a hearing on a permit suspension or revocation, they conflict with the statute and should not be extended.

Recommendation

We therefore recommend that Rules 3-4 (A) and 3-4 (D) of the rules of the Director concerning explosives regulations not be extended because they conflict with the statute by authorizing the summary revocation of a permit and by requiring the permittee to request a hearing to obtain a hearing on a permit suspension or revocation.

ADDENDUM A

Section 3-4 Procedure on Revocation, Suspension, or Denial of Explosives Permit

(A) In any case where the Division denies, ~~suspends, or revokes~~ a permit or the permittee is subject to suspension or revocation for a violation of Section 3-3 of these regulations, the Division shall notify the applicant or permittee in writing by first-class mail of the grounds for denial for the violation. The notice shall state that the applicant or permittee may request a hearing in accordance with Sections 24-4-104 and 24-4-105 C.R.S. ~~Said notice shall state the reason for denial, suspension, or revocation and state that, upon receiving a written request, a hearing shall be scheduled.~~

(B) Upon notice of the revocation or suspension of any permit, the former permittee shall immediately surrender to the Division the permit and all copies thereof. In addition, the former permittee must surrender control of all explosive material in his/her possession to the Division or the law enforcement agency designated by the Division, or in the presence of the Division or the law enforcement agency designated by the Division surrender control of all explosive material in his/her possession to a valid Type II permittee until a final determination on the charges is made.

(C) The period of denial, suspension, or revocation shall be within the sound discretion of the Division.

(D) The Division may summarily suspend a permit if the Division has objective and reasonable grounds to believe that the public health, safety, or welfare requires emergency action. In such case, the Division shall notify the permittee in writing by first-class mail of the grounds for summary suspension and shall state that the permittee may request a hearing in accordance with 24-4-105, C.R.S.

~~(D) Any person whose permit has been denied, suspended, or revoked under Section 3.3 may apply to the Division for a hearing in order to seek relief.~~

~~(1) The hearing shall be conducted by the Division or an Administrative Law Judge with the Division of Administrative Hearings on behalf of the Division in accordance with the procedures of 24-4-105 C.R.S.~~

~~(2) The Division may grant the relief requested in the hearing if the Division determines that~~

~~i. The applicant is in compliance with all federal regulations; and~~

~~ii.i. The circumstances regarding the denial, suspension, or revocation, and the applicant's record and reputation are such that the granting of such relief is not contrary to public safety.~~

(E) Any person aggrieved by a decision ~~or order of the Division~~ after a hearing may seek judicial review pursuant to the provisions of 24-4-106 C.R.S.

(F) Any person who has been denied a permit may not reapply to the Division for an explosives permit within one year of the decision, unless exception is made by the Division and the applicant establishes a substantial change in circumstances to indicate fitness to hold an explosive permit in accordance with the requirements of these regulations, State and Federal law.

(G) In case of revocation or suspension of a permit, the Division shall notify all vendors of explosives of such revocation or suspension ~~(24-4-104 C.R.S.)~~.